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IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES;
and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE CROW TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, JUDGES of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STEWART, Chairman of the Crow Indian Tribal Council,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1983

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES; LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioner,

vs.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; CROW INDIAN TRIBAL COUNCIL; EDDIE ROUNDFACE; GLEN BIRDINGROUND; IRA LEFT HAND; JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; and DONALD STEWART; Chairman of the Crow Indian Tribal Council.

Respondents.

REPLY IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Leroy Sage, a Minor, and Flora Not Afraid, his guardian, reply to the petition for writ of Certiorari to the United States Court of Appeals as follows:

OPINIONS BELOW

The opinion of United States District Court for the District of Montana is reported at 560 F. Supp. 213 (1983) and is reproduced in pages 14a-27a of Petitioners' Appendix ("Pet.App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 736 F.2d 1320 (1984) and is reproduced at Pet. App. 1a-13a.

JURISDICTION

The judgement of the Court of Appeals was entered July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1982).

QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues of this case are determined by the authorities cited herein.

STATEMENT OF THE CASE

Respondents dispute Petitioner's statement of the case. The Circuit Court below best stated the facts as follows:

"In May of 1982, Leroy Sage, a minor, an enrolled member of the Crow Indian Tribe, was struck by a motorcycle while in the parking lot of Lodge Grass School District No. 27. The School District is located on land owned by the State of Montana and within the exterior

boundaries of the Crow Indian Reservation. Sage and his guardian, Flora Not Afraid, filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Sage's complaint or to appear in tribal court to contest its jurisdiction. Sage ultimately obtained a default judgement against the school district. Upon receiving notice of the default judgement, the school district notified its insurer, National Farmers Union Insurance (National), of the tribal suit. Neither the school district nor National contested the default judgement in Crow Tribal Court, see Crow Tribal R. Civ. Proc. 17, or sought an appeal to the Crow Tribal Court of Appeals, See Crow Tribal Code Sec. 31-1-103; Crow Tribal R. App. Proc. 2. Instead, National obtained a temporary restraining order from a federal district court prohibiting Sage from enforcing his default judgement, and filed suit against the Crow Tribe, The Crow Tribal Council, the Crow Tribal Court, tribal judges and the chairman of the tribal council, seeking a permanent injunction. (Foot note omitted On December 29,1982, the district court entered a permanent injunction prohibiting Sage, Not Afraid, their counsel, the tribal judges and the chairman of the tribal council from executing on any judgement or pressing any claim against National or the school district arising from Sage's injury."

The Circuit Court reversed July 3,1984. Petitioners filed for Writ of Certiorari August 29,1984.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO QUESTION OF FEDERAL REVIEW OF INDIAN SOVEREIGNTY; THE CIRCUIT COURT MERELY FOUND NO FEDERAL JURISDICTION BECAUSE THE

COMPLAINT FAILED TO STATE A FEDERAL CLAIM FOR RELIEF.

The petitioners suggest that if the Court of Appeals decision is left intact, the petitioners and others like them will be left without a forum. As will be shown below, the Circuit Court decision does not leave petitioners without remedies; nor can it be said that the ruling makes tribal courts the first and last arbitors of their own jurisdiction; it merely makes a correct finding that the petitioners have failed by their pleadings to invoke federal jurisdiction.

A. Congress Forbids Federal Injunctions Against Exercise of Jurisdiction Of Tribal Courts.

A Federal District Court has no jurisdiction except as authorized by a specific Act of Congress. U.S. Const., Art. III, Sec. 1.; Gates v. Osborne, 9 Wall, 967. Santa Clara Pueblo v. Martinez 436 U.S.49,71,(1978) concludes after an extensive review of hearings, committee reports, debate, etc., pertaining to the ICRA that, "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in sec. 1303". 436 U.S. at 70. In reaching this conclusion, the Court took note of a number of factors indicating that its holding, contrary to the petitioner's contentions, (Pet.App.14) is not limited to a specific prohibition against federal actions to inforce the ICRA, but generally excludes causes of action in a federal district court as the means of obtaining a remedy against errors of the judgements of tribal courts. For example, the Court noted that Congress concluded

that federal review of tribal actions would undermine the authority of tribal forums. Santa Clara Pueblo Supra., at 59,64. Another reason Congress rejected federal review was because of the serious financial burdens it would place upon Indians,[1] Ibid, at 64,65.

Finally, the Santa Clara Pueblo decision found that tribal forums are appropriate for the exclusive adjudication of disputes effecting important personal and property rights of both indians and non-Indians.[2] Ibid. at 65.

The legislative history of Congress exhibits a clear intent on its part to balance the goal of preventing tribal injustices with the goal of avoiding interference into tribal affairs. It rejected a proposal that would have provided federal review de novo of tribal court actions. Ibid, at 67. Review by the Attorney General of the United States, and Review by the Bureau of Indian Affairs with subsequent appeal a federal district court was also rejected Ibid, at 68. If Congress intended to provide for federal review, it

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1. Respondents Leroy Sage and his guardian, Flora Not Afraid (Sage) have filed affidavits with the Crow Tribal Court indicating that the cost of this litigation, as a result of the petitioners' dragging Sage to the Federal District Court, The Ninth Circuit Court of Appeals, and now to this Court, have cost Sage to the 19th. day of September, 1984, for attorneys fees and costs, the sum of $46,371.02. As Sage's motion for leave to proceed in forma pauperis states, Leroy Sage is a minor and Flora Not Afraid is his guardian. She and her husband are unemployed, and have no income.

2. Space and time do not allow development of the proposition that the tribal courts and the various Indian Tribes, since Williams v. Lee, 358 U.S. 217 (1959) and enactment of the ICRA of 1968 have almost universally enacted comprehensive enlightened and modern civil codes to adequately discharge the inherent sovereignty they posess over civil causes of action. The petition for Certiorari offers no proof that these tribal forums cannot or will not afford impartial and fair adjudication of the present controversy or any other civil controversy.

would have so legislated. The Santa Clara Pueblo decision was handed down in 1978 and was concluded with a statement inviting Congress to make clear its intention to permit intrusion on tribal sovereignty by review of such actions in a federal forum. Six years have passed, would have so legislated. The Santa Clara Pueblo decision was handed down in 1978 and was concluded with a statement inviting Congress to make clear its intention to permit intrusion on tribal sovereignty by review of such actions in a federal forum. Six years have passed, yet Congress has not yet seen fit to modify Santa Clara Pueblo.

B. The Petitioners Have Other Remedies Which They Refuse To Pursue.

The petitioners, without citing any authority, make a sweeping statement that there exists a long-standing federal judicial practice of affording federal review of exertions of tribal court jurisdiction over non-Indians. Pet.App. 8. This is simply not true. As noted by the Circuit Court below, cases extending federal review of the inherent powers of Indian sovereignty have relied upon other federal bases for federal jurisdiction. See U.S. v. Montana 450 U.S. 544 (1981) (Declaritory judgement under 28 USC sec. 1345), Oliphant v Suquamish Indian Tribe 435 U.S. 191 (Habeas Corpus under 25 USC sec. 1303). Other important Indian cases also demonstate. Williams vs. Lee 358 US 217 (Cert. to review The Arizona Supreme Court); Moe v. Confederated Salish and Kootani Tribes 425 U.S. 463 (25 USC sec. 1362); U.S. v. Wheeler 435 US 313 (Cert. to the Federal Circuit Court to reveiw a Federal Criminal Prosecution).

C. The Petitioners Failed to Exhaust Tribal Remedies.

As stated above, the Crow Tribal Judiciary, contrary to the contentions of the petitioner, affords ample means of litigating any claims petitioners might assert.[3] The Crow Tribal Code is comprehensive, clear, and modern. It's Code of Civil procedure is patterned after The Federal Rules of Civil Procedure. Title 7, establishes the Crow Court of Appeals which has jurisdiction to hear appeals of all civil cases of the Crow Tribal Court. In addition to failing and refusing to appear in the Tribal Court, the petitioners have refused to attempt to be heard by the Crow Court of Appeals.

The petitioners have suggested no valid reason for their refusal to seek redress from the Crow Tribal Court. The majority opinion in the Circuit Court below concluded it's decision by stating that the proper forum for the determination of this controversy "at least in the first instance is not a federal court, but a tribal court". Pet. App. at 7a. The dissent is more specific adding:

> "Second, requiring exhaustion here would strengthen the Tribal Court System. The plaintiffs ignored that system and instead attempted to circumvent it by suing immediately in Federal Court. Such disrespect for tribal institutions should be discouraged." (Pet App. at 13 a.)

Santa Clara Pueblo, Supra, at 65,66, specifically found that tribal forums are appropriate for exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians.

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3. The petitioner's brief at page 4 states that had they gone to the Crow Tribal Court, they might have waived person and subject matter jurisdiction objections. This is not correct. Rule 7, Crow Civil Code of procedure (CCCP) specifically allows an appearance to object to subject matter, jurisdiction and personal jurisdiction and will not submit themselves to the jurisdiction of the court.

D. This Court Has The Power To Review Tribal Court Decisions.

Another avenue for review open to the petitioners is resort to this Court. The Constitution, Article III, Section 2, provides in part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority;.....
>
> In all cases effecting embassadors, other public ministers and consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulation as the Congress shall make."

The appellate power of this Court is derived from the Constitution its self, not acts of Congress. Ex Parte, McKardle, 7 Wall.506, 512 (1869).

Apparently, this court has never decided whether, in the absence of Congressional regulation, it can exercise appellate power, because among the earliest Acts of the First Congress, at it's first session in September of 1789, Congress provided the first regulation of this Courts appellate review of federal questions arising in Indian Courts. The question has mostly laid dormant since then. Chief Justice Marshall speaking in the case of U.S. v. More, 3 Cranch 159,172,173 (1805), observed as follows:

> ".....the Attorney General ... seems to argue that... the Supreme Court possessed appellate jurisdiction... over the judgements of every court, whose decision it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

> This argument would be unanswerable if the Supreme Court had been created by a law, without describing it's jurisdiction the Constitution would have been the only standard by which it's powers could be tested, since there would be clearly no Congressional Regulation or exception on the subject.

In More, Justice Marshall dismissed an appeal arising from the Circuit Court of the District of Columbia because he interpreted the regulating act of Congress to exclude appeal to the Supreme Court. But, what if no exception or regulation of Congress existed? Such is the case with regard to the appeal of Indian decisions.

The McKardle case, Supra, at 513, demonstrates the assumptions that have been made over the years in the absence of a clear case where congress has not regulated. Justice Chase, speaking for court said:

> "The source of that jurisdiction, and the limitations of it by the Constitution and by the stature, have been on several occasions subjects of consideration here. In the case of Durousseau v U.S. 6 Cranch, 312;Wiscart v. Dauchy, 3 Dall. 321, particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the Judicial Act, but are given by the Constitution; "they are nevertheless, 'limited and regulated by that Act, and by such other Acts as have been passed on the subject.' The court said, further, that the Judicial Act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court."
>
> "They have described affirmatively," said the court,"it's jurisdiction, and this affirmative description has been understood to imply a negatation of the exercise of such appellate power as is not comprehended within it."
>
> The principle is the affirmation of appellate jurisdiction implies the

> negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that Acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as Acts granting jurisdiction, and not as Acts making exceptions to the constitutional grant of it.

But, as noted above, the precise question of the scope of this courts appellate power, in the absence of congressional exceptions or regulations, has never been fully answered. In the case of Wiscart v. Dauchy, 3 Dall. 321, 326 (1796), the dissenting opinion of Justice Wilson contended that the governing Act of Congress then regulating this court's appellate jurisdiction had failed to regulate on the subject of review of certain cases, and that therefore, appeal could be had by resort to the authority granted in the Constitution it self. He said:

> "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations at the Congress shall make." The appellate jurisdiction, there flowed, as a consequence, from this source; nor had the legislature any occasion to do, what the constitution had already done. The legislature might, indeed, have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the constitution, which in general terms, and on general principles, provides and authorizes an appeal."

However, the majority opinion in that case made a straight forward statement that, "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdication; and if the rule is provided, we cannot depart from it." Ibid at 327. But

the Wiscart case did envolve an interpretation of an existing act regulating the appellate jurisdiction of this court. Hence, there does not appear to be a decision regarding the scope of the appellate power in the absence of congressional regulation.

A closer look at the Constitutional provision lends credance to the argument that exercise of the appellate power in the absence of regulation, was contemplated by the framers. The qualifying word used in connection with the regulatory power of Congress is the word, "with". The way the term is used in the sentence indicates that it is used in the sense of indicating a combination, joinder, or addition to, but not to the exclusion of it's antecedent, the appellate power. This is demonstrated by considering that if the framers had intended to exclude exercise of appellate jurisdiction in the absence of Congressional regulation, they could have easily done so by using words such as "only with", or "when with", or "if with", instead of "with".

In addition, it ought to be noted that the primary purpose of section 2 was to define the judicial power, including the appellate power. It seems that, if the framers intended to make Congressional regulation a prerequisite to the exercise of the appellate power, they would have given the mention of regulation a more prominent place in the clause.

Finally, a very well reasoned law review article construing the appellate power of this Court concludes that the power of Congress to except and regulate the appellate power cannot be construed so as to give Congress the power to preclude Supreme Court review. 109 V.Pa.L.Rev. 157. It would seem to follow that in

the absence of exception and regulation, this Court, likewise, is not precluded from excercising the power of appellate reveiw.

Appellate review of Indian Court decisions falls in this category. There is no act of Congress on the subject. It is respectfully submitted that, in the absence of an Act of Congress this, Court may in a appropriate case review Indian court decisions.

Exercise of the appellate power of this court will afford proper and orderly appellate review of tribal court decisions of Federal questions apd at the same time will avoid the harsh remedy the petitioners attempted by obtaining ex parte, an injunction from a federal district court.

It is assumed that this Court will, until and in absence of Congressional regulation, formulate its own rules for exercise of this appellate power. Any such procedural rules ought to require an exhaustion of tribal remedies before this Court reviews. The petitioners, have not exhaused tribal remedies and ought not to be afforded any relief by this Court until they do so. Thus, Certiorari, should not, at least at this time, be granted.

This exhaustion requirement is demonstrated by a comparison to the rules for review of State court decisions. 28 USC sec. 1257 sets forth the rule for review of State decisions. It Requires that this Court review only decisions of "the highest court of a state." Comity calls for similar rules for review of Indian decisions. Therefore, as stated before, this controversy is not now ripe for review.

Respect for Indian self-government,further supports the argument. The petitioners have deliberate-

ly, strategically, and disrespectfully refused to obtain reviewed by the processes of the tribal court system.

E. The Petition Ought To Be Denied Pursuant To Rule 21.5.

As stated above, the petition herein makes the sweeping statement that this case presents important and frequently reoccuring questions regarding Federal Review of Indian Tribal Sovereignty. However, analysis herein shows that the the Circuit Court decision merely interpreted jurisdictional statutes; It does not necessarily deny all federal review. Other remedies are available. The petition simply does not show that the question presented is a frequently re-occuring question. For these reasons alone, it is requested that petition be denied pursuant to rule 21.5, of the rules of this Court.

F. A Federal District Court Is Not An Appellate Court Over indian Courts

The Circuit Court is rightfully concerned over a complaint in Federal District Court for injunctive relief against a Tribal Court which is attempting to exercise adjudicatory civil jurisdiction. The impact of a federal injunction against a tribal court issued ex parte is humiliating, extraordinary, and harsh. The practical effect of the petitioner's attempt to invoke federal jurisdiction is to obtain appellate review by the federal district court. As stated above, federal courts have only the jurisdiction Congress grants them.

Furthermore, A Federal District Court is not an Appellate Court, Wooker v. Fedility Trust Company 263 U.S. 413. A federal district court has no jurisdiction to review a state court judgement; such action would be

a collerateral attack upon the state court's judgements; the proper method for review is appeal; lower federal Courts are not superior to state courts. Lyon v. Department of trade, 262 U.S. 77. Even if a state court acts without jurisdiction, its determination is not subject to collateral attack by the federal district court. The proper remedy is by appeal within the state court system. More v. Pate 39 F. 2d 616.

The federal court has no jurisdiction under 28 USC sec. 1331 to review a state courts' decision on Constitutional issues, Stafford v. Superior Court, 272 F2d. 407. A specific statute, 28 USC sec. 2283, specifically forbids federal courts from enjoining state proceedings, except under circumstances requiring federal intervention to protect federal jurisdiction.

There appears to be no reasonable basis why the above principles and laws forbidding federal intrusion into state court proceedings should not also be applied to tribal court proceedings. A Tribal Court acts with inherent sovereign power to the extent federal law allows. It retains all inherent attributes of soverignty not devested by the federal government. Marrion v. Jicarilla Apache Tribe 455 U.S. 130,148. One of the functions of sovereignty is to establish a judicial tribunal. Austin v. Searing,16 N.Y. 112. The soverign Indian tribes have not only established tribal court systems, but they have done so with express federal congressional recognition and encouragement. Santa Clara Pueblo v. Martines, 436 U.S. 49,71; 25 U.S. sec. 1202, 25 USC sec. 1902. At the same time that Congress encouraged and recognized this tribal civil jurisdiction, it specifically and intentionally limited

federal distict court review. Santa Clara Pueblo v. Martinez, 436 U.S. 49,71.

If a tribal court acts as a sovereign in discharging its legitimate civil adjudicatory authority, there appears to be no valid reason why its exercise of jurisdiction ought to be any more vulnerable to collateral federal attack than are the courts of the various states.

As stated above, the proceedure for appellate review is to first go to the Crow Court of Appeals. In the absence of appropriate Congressional regulation, further appeal of federal questions could be reviewed by this Court under it's appellate power. Until the petitioners seek appropriate appellate review of the Tribal Court's decisions by appropriate proceedure, they ought not to receive relief from this Court, or any federal court.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURTS DECISION IN SANTA CLARA PUEBLO.

Contrary to the contentions of the petitioners, and as set forth above, Santa Clara Pueblo, Supra, at 65,66 is not limited to it's facts. The decision holds generally that Congress has forbidden federal court intrusion into the exercise of the legitimate authority of Indian courts.

The petitioners give no adequate support for their general characterization of Santa Clara Pueblo. Under rule 21.5, no basis for granting certiorari appears in their petition.

III. PETITIONER'S SECOND QUESTION PRESENTED AS TO WHETHER THE TRIBAL COURT HAS JURISDICTION OF THIS ACTION, WAS INCORRECTLY DECIDED BY THE DISTRICT COURT BELOW.

The petitioners suggest in their petition that one of the questions presented by their this case is whether a tribal court has civil jurisdiction over claims against a subdivision of a State or other persons compelled or encouraged by state or federal law or policy to provide services on a reservation. The petitioners present no support for their views on this question. We respectfully submit that the petition ought to be denied pursuant to rule 21.5. However, because this question is at the heart of this whole controversy, and was incorrectly decided by the District Court, it seems appropriate to outline the law pertinent to this question.

A. The Law Is Settled That Tribes Retain Inherent Sovereign Power Over Civil Suits By Members Injured By The Conduct Of Non-Indians While Inside The Reservation.

"To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." The United States v. Montana 450 U.S. 544,565. This inherent soverign power is stated by the principle case in this area, Williams v. Lee 358 U.S. 217, as the power of "reservation Indians to make their own laws and be governed by them". Ibid, 358 U.S. at 220.

Exercise of this inherent Indian soverignty power excludes state court jurisdiction Ibid. This power extends over non-Indians because the basis of the power is not the status of the defendant, but, (1) his presence on the reservation, Williams v. Lee 358 U.S. at p. 217,223, United States v. Mazurie, 419 U.S. 544,558,

and, (2) his conduct therein. Williams v. Lee, Ibid United States v. Mazurie, Ibid; Washington v. Confederated Tribes of The Coleville Indian Reservation, 447 U.S. 134,166,167; Fisher v. District Court, 424 U.S. 382,386.

The power of the Indian court is territorial, it is not as to persons only. United States v. Wheeler 435 U.S. 313 (Cert. to the Federal Circuit Court, review Federal Criminal prosecution), p 313. United States v. Mazurie 419 U.S. 544,at 557. Cherokee Nation v. Georgia, 5 Pet App at 16-17. New Mexico v. Mescalero Apache Tribe 103 S.Ct. 2378,2387, White Mountain Apache Tribe v. Brecker, 448 U.S. 136, 151.

On June 1, 1868, General William T. Sherman, for the United States executed a Treaty with the heads of The Navajo Nation. 15 Stat. 667. In Williams v. Lee, Supra, at 221, this court stated that implicit in the treaty terms was the understanding that the internal affairs of tne indians remained exclusively within the jurisdiction of what ever tribal government existed. May 7, 1868, less than one month before the Treaty with the Navajos, General Sherman also executed a Treaty with the Crows which is identical in it's provisions regarding internal affairs as that of the Navajo. 15 Stat. 649. It would appear that the Crows are entitled to the same exclusive jurisdiction.

Congressional Acts support Indian self government. A number of Congressional Acts specifically grant civil and criminal authority to various states. See 25 USC sec. 232.233. 18 USC sec.1162, 28 USC 1360, (Granting civil and criminal jurisdiction to the States of New York, California, Minnesota, Nebraska, Oregon, and

Wisconsin). The Indian Civil Rights Act of 1968 is especially instructive as to Congressional intent with regard to civil jurisdiction of the tribal courts. Sec. 1322, sets the conditions for assumption of state jurisdiction over Indian civil matters. It describes civil causes of action "between Indians, or to which Indians are parties". It seems reasonable to assume that without the assumption of jurisdiction by the various states, including Montana, that Indian Courts have exclusive jurisdiction over civil causes of action to which Indians are parties.

The decisions of this court have recognized only two limitations upon inherent Indian sovereignty over civil actions involving non-Indians. The first is a matter involving an over-riding federal interest. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191. This case found an over-riding federal interest, the liberty of citizens generally, which acted as a federal limit on inherent Indian soverignty in criminal matters. Thus, tribal courts have no criminal jurisdiction over non-Indians. This over-riding federal interest is not involved in civil matters. Loss of Liberty is not at stake; the judgement results in compensation or adjustment of personal rights and obligations between litigants. Furthermore, unlike criminal actions where the central government is the complaining party, a civil action involves private plaintiffs. Thus, there is less need to assert over-riding federal protection of the citizenry from abuses of the power of the tribal government as there is in criminal cases.

Another consideration is important. Conflicts of law principles calls for a forum between private litigants where the tort was committed. This principle

gains added meaning considering the principles of Indian self-government which call for a forum familiar with and prone to apply to local Indian laws, traditions, customs, and even the Indian Language.

The second limit on inherent Indian soverignty was most recently articulated in Montana v. United States, 450 U.S. 544,566,wherein the court stated:

> "A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within it's reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court 424 U.S. 382,386, Williams v. Lee Supra. at 220, Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264,273.

The District court below, in error, concluded that the general rule in Montana does not apply to this case because the injury to Leroy Sage is an injury to an individual, and, therefore, does not effect the health and welfare of the Crow Tribe.[4]

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4. The Honorable James F. Battin, stated, "As those familiar with Indian Law are aware, the law changes rapidly in this area. An old case is old law." Pet. App. at 23. Judge Battin referred to Williams v. Lee in making this statement. The latest case in the field of Indian law, handed down by this Court, Three Affiliated Tribes of The Fort Berthold Reservation v. Wold Engineering. 104 S Ct. 2267 (Decided May 29,1984) cites Williams v. Lee no less than seven times, all with specific approval of the holding therein. The case of U.S. v. Montana, Supra, relied upon exclusively by Judge Battin for his holding cites Williams v. Lee at lease three times, all with approval. The very rule adopted by Judge Battin (U.S. v. Montana) cites Williams v. Lee as the source for the rule.

This reasoning is fallacious for a number of reasons. First, the tribe has a substantial interest in protecting the health and welfare of it's individual members. Its organization, including the courts, exist for no other purpose. Second, the tribe has an interest in compensating it's members adequately for wrongs occasioned by the conduct of persons inside the reservation. Third, it has an interest in providing a forum for it's members to adjudicate controversies. Finally, it has an interest in detering tortious conduct by persons inside the reservation whose conduct is offensive and injurious.

The ruling of Judge Battin, below that an injury to an individual is not injury to the tribe, was laid to rest and rejected in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973). This case involved an action by a Navajo Indian against the State Tax Commission of Arizona for refund of State income taxes paid. The State of Arizona argued that because the tax was levied against the individual Indian, that there was no infringement against the tribe as a whole or, the court in rejecting this argument stated:

> "Finally, we cannot accept the notion that it, is irrelevent, whether the State Income Tax infringes on 'appellants' rights as an individual Navajo Indian as the State Court of Appeals maintains."
> To be sure, when congress has legislated on Indian matters, it has, most often, delt with the tribes as collective entities. But those entities are, after all, composed of individual indians, and the legislation confers individual rights. This court has therefore held that the "question has always been whether the state action infringed on the right of reservation indians, to make their own laws and be ruled by them." Williams v. Lee, Supra, at 220 of

> 358 U.S. In this case, appellants rights, as a reservation indian, were violated when the state collected a tax from her which it had no jurisdiction to impose. Accordingly, the judgement of the court below must be reversed." (411 U.S. at 181).

As stated above, the petitioner raises the question of the scope of tribal court jurisdiction over civil controversies involving non-Indian defendants, but offers no authority for the proposition that this question ought to be heard and decided by this court under the circumstances presented by this case. It is, therefore, respectfully requested that the application for Certiorari be denied pursuant to rule 21.5.

B. Tribal Sovereignty Over Civil Causes Of Action Against Non-Indians Is Not Diminished Because Of Any Special State Of The Particular Non-Indian Defendant.

The petitioners suggest that entities obligated by law or policy to furnish services to Indians on the reservation ought to be afforded some kind of exemption or immunity from the civil jurisdiction of the Tribal Court. However, the petitioners do not develop this argument in any manner whatsoever, and, therefore, they are not entitled to review by Certiorari because of their failure to support this suggestion. Rule 21.5.

However, it seems appropriate, in spite of the petitioners failure to speak to this issue, that this reply addresses the subject.

"Inherent Indian Sovereignty is dependent on, and subordinate to only the Federal Government, not the States." Washington v. Confederated Tribes of Colevil-le, 447 U.S. 134,154. "It must be remembered that Indian soverignty is not conditioned on the assent of a

non-member; to the contrary, the non-members presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."(emphasis supplied) Marrion v. Jicarilla Apache Tribe 455 U.S. 130, 147. "What ever place consent may have in contractial matters and in the creation of democratic governments. it has little if any role in measuring the validity of an exercise of ligitimate soverign authority. Requiring the consent of the entrant, deposits in the hands of the excludable non-Indian, the source of the tribe's power, when the power instead derives from soverignty itself. Only the Federal Government may limit a tribe's exercise of it's soverign authority." Ibid. at 147.

Furthermore, the petitioners have shown no authority for the proposition that they, or others like them, are present on the reservation by some force of law or policy. It has not been shown that the Lodge Grass School, by force of either state or federal law had to be built inside the Crow Reservation. Its location is a geographical convenience to those attending school. It was built there by choice, not by order of law or policy.

The organic act of the State of Montana, 13 Stat 85, and the Enabling Act, 25 Stat 676, placed conditions upon statehood. The enabling act states in part:

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right entitled to the unappropriated public lands lying within boundaries thereof and to all lands lying within said limits owned or held by an Indian or Indian Tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands

> shall remain under the absolute jurisdiction and control of the Congress of the United States.

As stated in the case of United States v. Kagama, 118 U.S. 375, the Indians "owe no alligance to the states, and receive from them no protection. Because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing from the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 118 U.S. at 384. A bibliography of Indian cases coming before this court would, for the most part, substantiate a longstanding conflict between state and tribal authorities. If anything, the presence of state authorities, agencies, or institutions inside the reservation calls for a greater affirmation of Indian Sovereignty, instead of some state immunity as appearantly claimed here.

Between the lines of the petition herein seems an imlied argument that tribal forums will, somehow, deny the petitioner and others like them, of a fair and impartial adjudication. This is not true. Most importantly, it is not demonstrated. If the petitioners found themselves the subject of a tort lawsuit arising from their conduct within the State of Wyoming, or Idaho, they would never dream of restraining courts of those states from exercising their legitimate jurisdiction. Even if they assert that the State courts are without jurisdiction, and acting in flagrant abuse of their power, and in violation of federal law, the proper remedy would be by appeal to the appellate courts of the respective states. Only after exhausting State appeals

could they seek federal review. The principles of Law considered here require that the tribal court system be afforded no less consideration and respect. They act as sovereigns too; as sovereigns they deserve the respect ordinarily afforded. Until petitioners pursue tribal remedies, this Court ought to deny their petitions.

CONCLUSION

The Circuit Court decision does not leave petitioners without a forum or a remedy. It merely recognizes the limits Congress has placed upon review of Indian Court decisions by a federal district court. Petitioners refuse to pursue tribal remedies available. Other remedies are available. The Circuit Court has followed Santa Clara Pueblo. The petition should be denied.

Respectfully Submitted this 26th. day of October, 1984.

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CERTIFICATE OF SERVICE

I, Clarence T. Belue, a member of the bar of this court, hereby certify pursuant to Rule 20 of the rules of this court, that counsel listed below have been served with copies of the foregoing Reply in Opposition to Petition for Certiorari this date by 1st. class mail,

postage prepaid. I also certify that, to the extent known, all parties required to be notified and served have been served.

Dated this 26th. day of October, 1984.

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